

CHAPTER 210
VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION

Part I

VWP Permit Program Definitions, Exclusions, Prohibitions and Requirements

9VAC25-210-10. Definitions.

A. Definitions specific to surface water withdrawals are in 9VAC25-210-300.

B. Unless a different meaning is required by the context, the following terms as used in this chapter shall have the following meanings:

"Adjacent" means bordering, contiguous, or neighboring wetlands separated from other surface water by man-made dikes or barriers, natural river berms, sand dunes, and the like.

"Administratively withdrawn" means a decision by the board that permanently discontinues the review or processing of a VWP permit application or request to modify a VWP permit.

"Applicant" means a person applying for a VWP individual permit or for coverage under a VWP general permit.

"Aquatic environment" means surface waters and the habitat they provide, including both plant and animal communities.

"Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment.

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife resources and habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, and cultural and aesthetic values is an instream beneficial use of Virginia's waters. Offstream beneficial uses include, but are not limited to, domestic uses (including public water supply), agricultural uses, electric power generation, commercial uses, and industrial uses.

"Best management practices" or "BMPs" means a schedule of activities, prohibition of practices, maintenance procedures, and other management practices that prevent or reduce the pollution of surface waters.

"Board" means the State Water Control Board.

"Channelization" means the alteration of a stream channel by widening, deepening, straightening, cleaning, or paving certain areas.

"Compensation" or "compensatory mitigation" means (i) the restoration (reestablishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources or (ii) in certain circumstances an out-of-kind measure having a water quality, habitat, or other desirable benefit for the purposes of offsetting unavoidable adverse impacts to aquatic resources that remain after all appropriate and practicable avoidance and minimization has been achieved.

"Construction site" means any site where land-disturbing activity is conducted or physically located for the purpose of erecting buildings, roads, or other discrete structures, including on-site or off-site areas used for dependent, support facilities, such as quarries, mines, or temporary stormwater management or erosion control structures.

"Conversion" means those impacts to surface waters that permanently change an existing wetland or aquatic resource type to a different wetland or aquatic resource type.

"Coverage" means authorization to conduct a project in accordance with a VWP general permit.

"Cowardin classification" or "Cowardin classification method," unless otherwise specified in this chapter, means the waters classification system in Classification of Wetlands and Deepwater Habitats of the United States (Cowardin, Lewis M. II, et al., U.S. Fish and Wildlife Service, December 1979, Reprinted 1992).

"Creation" means the establishment of a wetland or other aquatic resource where one did not formerly exist.

"Cross-sectional drawing" means a scaled graph or plot that represents the plane made by cutting across an object at right angles to its length. Objects may include, but are not limited to, a surface water body or a portion of it, a man-made channel, an above-ground structure, a below-ground structure, a geographical feature, or the ground surface itself.

"Department" or "DEQ" means the Department of Environmental Quality.

"Director" means the Director of the Department of Environmental Quality (DEQ) or an authorized representative.

"Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of any pollutant or combination of pollutants, to state waters.

"Draft VWP permit" means a document indicating the board's tentative decision relative to a VWP permit action.

"Draining" means human-induced activities such as ditching, excavation, installation of tile drains, hydrologic modification by surface water runoff diversion, pumping water from wells, or similar activities such that the activities have the effect of artificially dewatering the wetland or altering its hydroperiod.

"Dredged material" means material that is excavated or dredged from surface waters.

"Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

"Ecologically preferable" means capable of providing a higher likelihood than alternative proposals of replacing existing wetland acreage and functions, stream functions, water quality, and fish and wildlife resources.

"Emergent wetland" means a class of wetlands dominated by erect, rooted, herbaceous plants growing in water or on a substrate, excluding mosses and lichens. This vegetation is present for most of the growing season in most years and is usually dominated by perennial plants.

"Enhancement" means activities conducted in existing wetlands or other portions of the aquatic environment that increase one or more aquatic functions.

"Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

"Fill" means replacing portions of surface water with upland, or raising the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.

"Fill material" means any pollutant that replaces portions of surface water with dry land or that raises the bottom elevation of a surface water for any purpose.

"Forested wetland" means a class of wetlands dominated by woody vegetation that is approximately 20 feet (six meters) tall or taller and three inches (7.6 centimeters) or larger in diameter at breast height (DBH). These areas typically possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.

"Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the

ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

"Impacts" means results caused by those activities specified in § 62.1-44.15:20 A of the Code of Virginia.

"Impairment" means the damage, loss, or degradation of the acreage or functions of wetlands or the functions of state waters.

"Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent public and economic utility.

"In-lieu fee program" means a program operated by a nonprofit organization or governmental agency that receives moneys from persons impacting wetlands or streams pursuant to an authorized, permitted activity and that expends the moneys received to provide consolidated compensatory mitigation for permitted wetland or stream impacts.

"Isolated wetlands of minimal ecological value" means those wetlands that (i) do not have a surface water connection to other state waters, (ii) are less than one-tenth of an acre (0.10 acre or 4,356 square feet) in size, (iii) are not located in a Federal Emergency Management Agency designated 100-year floodplain, (iv) are not identified by the Virginia Natural Heritage Program as a rare or state significant natural community, (v) are not forested, and (vi) do not contain listed federal or state threatened or endangered species.

"Joint Permit Application" or "JPA" means an application form that is used to apply for permits from the Norfolk District Army Corps of Engineers, the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and local wetland boards for work in waters of the United States and in surface waters of Virginia.

"Law" means the State Water Control Law of Virginia.

"Legal name" means the full legal name of an individual, business, or other organization. For an individual, legal name means the first name, middle initial, last name, and suffix. For an entity authorized to do business in Virginia, the legal name means the exact name set forth in the entity's articles of incorporation, organization or trust, or formation agreement, as applicable.

"Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation.

"Mitigation" means sequentially avoiding and minimizing impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

"Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use, and operation of mitigation banks and is operating under a signed banking agreement.

"Mitigation banking" means compensating for unavoidable wetland or stream losses in advance of development actions through the sale or purchase of credits from a mitigation bank.

"Nationwide permit" means a general permit issued by the U.S. Army Corps of Engineers (USACE) under 33 CFR Part 330 and, except where suspended by individual USACE Corps Districts, applicable nationwide.

"Nontidal wetland" means those wetlands other than tidal wetlands that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act in 40 CFR 230.3(t). Wetlands generally include swamps, marshes, bogs, and similar areas.

"Normal agricultural activities" means those activities defined as an agricultural operation in § 3.2-300 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Normal residential gardening and lawn and landscape maintenance" means ongoing noncommercial residential activities conducted by or on behalf of an individual occupant, including mowing; planting; fertilizing; mulching; tilling; vegetation removal by hand or by hand tools; and placement of decorative stone, fencing, and play equipment. Other appurtenant noncommercial activities, provided that they do not result in the conversion of a wetland to upland or to a different wetland type, may also be included.

"Normal silvicultural activities" means any silvicultural activity as defined in § 10.1-1181.1 of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such silvicultural activity but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Notice of project completion" means a statement submitted by the permittee or authorized agent that the authorized activities and any required compensatory mitigation have been completed.

"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.

"Ordinary high water" or "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

"Out-of-kind compensatory mitigation" or "out-of-kind mitigation" means a measure that does not replace the same type of wetland or surface water as was impacted but does replace lost wetland or surface water functions or provide a water quality, habitat, or other desirable benefit.

"Perennial stream" means a well-defined channel that contains water year round during a year of normal rainfall. Generally, the water table is located above the stream bed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.

"Permanent flooding or impounding" means a permanent increase in the duration or depth of standing water on a land surface, such as from a dam. Permanent increases in duration or depth of standing water that result from extended-detention basins and enhanced extended-detention basins, when designed, constructed, and maintained to function in accordance with Virginia Department of Conservation and Recreation (DCR) standards for such facilities (Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3), or when designed in accordance with local standards that, at a minimum, meet the DCR standards, are not considered to be permanent flooding and impounding.

"Permanent impacts" means those impacts to surface waters, including wetlands, that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters or of the acreage or functions of a wetland.

"Permittee" means the person who holds a VWP individual or general permit.

"Permittee-responsible compensatory mitigation" or "permittee-responsible mitigation" means compensation or compensatory mitigation, as defined in this section, that is undertaken by the permittee, or an authorized agent or contractor, for which the permittee retains full responsibility.

"Person" means individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity.

"Phased development" means more than one project proposed for a single piece of property or an assemblage of contiguous properties under consideration for development by the same person, or by related persons, that will begin and be completed at different times. Depending on the relationship between the projects, a phased development may be considered a single and complete project or each project may be considered a single and complete project if each project has independent utility, as defined in this section.

"Plan view drawing" means a scaled graph or plot that represents the view of an object as projected onto orthogonal planes. Objects may include, but are not limited to, structures, contours, or boundaries.

"Pollutant" means any substance, radioactive material, or heat that causes or contributes to or may cause or contribute to pollution.

"Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (i) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter.

"Practicable" means available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.

"Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.

"Profile drawing" means a scaled graph or plot that represents the side view of an object. Objects may include, but are not limited to, a surface water body or a portion of it, a man-made channel, an above-ground structure, a below-ground structure, a geographical feature, or the ground surface itself.

"Public hearing" means a fact finding proceeding held to afford interested persons an opportunity to submit factual data, views, and comments to the board pursuant to § 62.1-44.15:02 of the Code of Virginia.

"Regional permit" means a general permit issued by the U.S. Army Corps of Engineers under 33 CFR Part 330 and applicable within a specified geographic area.

"Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.

"Section 401" means § 401 of the Clean Water Act, or 33 USC § 1341, as amended in 1987.

"Scrub-shrub wetland" means a class of wetlands dominated by woody vegetation, excluding woody vines, approximately three to 20 feet (one to six meters) tall. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.

"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions.

"Single and complete project" means the total project proposed or accomplished by a person, which also has independent utility as defined in this section. For linear projects, the single and complete project (e.g., a single and complete crossing) will apply to each crossing of a separate surface water (e.g., a single water body) and to multiple crossings of the same water body at separate and distinct locations. Phases of a project that have independent utility may each be considered single and complete.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

"Stream bed" or "stream channel" means the substrate of a stream, as measured between the ordinary high water mark along each side of a stream. The substrate may consist of organic matter, bedrock, or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water mark along each side of a stream, are not considered part of the stream bed.

"Surface water" means all state waters that are not groundwater as groundwater is defined in § 62.1-255 of the Code of Virginia.

"Suspend" or "suspension" means a decision by the board that stops the review or processing of a permit application or request to modify a permit or permit coverage until such time that information requested by the board is provided, reviewed, and deemed adequate.

"Temporary impacts" means impacts to wetlands or other surface waters that do not cause a permanent alteration of the physical, chemical, or biological properties of surface waters or the permanent alteration or degradation of existing wetland acreage or functions. Temporary impacts include activities in which the impact area is restored to its preconstruction elevations and contours with topsoil from the impact area where practicable, such that previous wetland acreage and functions or surface water functions are restored.

"Tidal wetland" means vegetated and nonvegetated wetlands as defined in § 28.2-1300 of the Code of Virginia.

"Toxic pollutant" means any agent or material including, but not limited to, those listed under § 307(a) of the Water Pollution Prevention and Control Act (33 USC § 1317(a)), which after discharge will, on the basis of available information, cause toxicity. Toxicity means the inherent potential or capacity of a material to cause adverse effects in a living organism, including acute or chronic effects to aquatic life, detrimental effects on human health, or other adverse environmental effects.

"Undesirable plant species" means any species that invades, naturally colonizes, or otherwise dominates a compensatory mitigation site or mitigation bank, such that it causes or contributes to the failure of the vegetative success criteria for a particular compensatory mitigation site, mitigation bank, or in-lieu fee program project, or it otherwise prohibits the restoration of the same vegetation cover type that was originally present.

"VWP general permit" means the general permit text, terms, requirements, and conditions set forth in a regulation that constitutes a VWP permit authorizing a specified category of activities.

"VWP permit" means an individual or general permit issued by the board under § 62.1-44.15:20 of the Code of Virginia that authorizes activities otherwise unlawful under § 62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.

"Water quality standards" means water quality standards adopted by the board and approved by the administrator of the U.S. Environmental Protection Agency under § 303 of the Clean Water Act as defined in 9VAC25-260-10.

"Watershed approach" means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed and that ensures authorized impacts and mitigation have been considered on a watershed scale.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 1.1, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-20 to 9VAC25-210-40. (Repealed.)

Historical Notes

Derived from VR680-15-02 §§ 1.2 to 1.4, eff. May 20, 1992; repealed, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

9VAC25-210-45. Surface waters delineations.

A. Wetlands. Each wetland delineation, including those for isolated wetlands, shall be conducted in accordance with the U.S. Army Corps of Engineers (USACE) "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual) and any

regional wetland supplements approved for use by USACE. These Federal Manuals shall be interpreted in a manner consistent with USACE guidance and the requirements of this chapter, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices. USACE regulatory guidance letters or Department of Environmental Quality policy or guidance may be used to supplement preparation of wetlands delineations.

B. Other surface waters. Delineations for surface waters other than wetlands may be conducted in accordance with USACE or DEQ policy or USACE or DEQ guidance and shall take into consideration the location of an ordinary high water mark, if present.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001; amended, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-50. Prohibitions and requirements for VWP permits.

A. Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters; withdraw surface water; otherwise alter the physical, chemical, or biological properties of state waters regulated under this chapter and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; excavate in wetlands; or on or after October 1, 2001, conduct the following activities in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
2. Filling or dumping;
3. Permanent flooding or impounding; or
4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

B. No VWP permit shall be issued:

1. Where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations including, but not limited to, § 10.1-1408.5 of the Code of Virginia;
2. For the discharge of any radiological, chemical, or biological warfare agent or high level radioactive material into surface waters.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 1.5, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 25, Issue 5, eff. December 10, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-55. Statewide information requirements.

The board may request (i) such plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter. Any owner, permittee, or person applying for a VWP permit or general permit coverage shall provide the information requested by the board.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-60. Exclusions.

The activities in this section do not require a VWP permit but may require other permits under state and federal law. Upon request by the board, any person claiming one of these exclusions shall demonstrate to the satisfaction of the board that he qualifies for the exclusion. Exclusions pertaining to surface water withdrawals are established in 9VAC25-210-310.

1. Discharges of dredged or fill material into state waters, except wetlands, which are addressed under a USACE Regional, General or Nationwide Permit, and for which no § 401 Water Quality Certificate is required.
2. Any discharge of stormwater from municipal separate storm sewer systems or land disturbing activities authorized by 9VAC25-870, or the discharge of sewage, industrial wastes, or other wastes or any noxious or deleterious substances into surface waters that is authorized by a Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9VAC25-31 or a Virginia Pollution Abatement (VPA) permit in accordance with 9VAC25-32.
3. Any activity governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, unless state certification is required by § 401 of the Clean Water Act. State certification is waived if the activity meets the provisions of subdivision 10 a of this section. The activity does not require a VWP permit pursuant to § 62.1-44.15:21 G of the Code of Virginia.
4. Normal residential gardening and lawn and landscape maintenance in a wetland, or other similar activity, that is incidental to an occupant's ongoing residential use of property and is of minimal ecological impact. The criteria governing this exclusion are set forth in the definition of "normal residential gardening and lawn and landscape maintenance" in 9VAC25-210-10.
5. Maintenance of currently serviceable structures, such as purpose-built stormwater and utility structures, transportation structures, dikes, groins, levees, dams, riprap breakwaters, causeways, or bridge abutments or approaches. Maintenance includes the emergency reconstruction of recently damaged parts but does not include modifications that change the character, scope, or size of the original design. If the original design is not available, the permittee shall submit the best available information on the design for consideration and approval by the board. In order to qualify for this exclusion, emergency reconstruction shall occur as soon as practicable after damage occurs.
6. Impacts to open waters that do not have a detrimental effect on public health, animal life, or aquatic life or to the uses of such waters for domestic or industrial consumption, recreation, or other uses.
7. Flooding or back-flooding impacts to surface waters resulting from the construction of temporary sedimentation basins on a construction site when such structures are necessary for erosion and sediment control or stormwater management purposes.

8. Normal agriculture and silviculture activities in a wetland such as plowing; seeding; cultivating; minor drainage and harvesting for the production of food, fiber, and forest products ; or upland soil and water conservation practices.

a. To fall under this exclusion, the activities specified in this subdivision 8 must be part of an established (i.e., ongoing) agriculture or silviculture operation, and must be in accordance with applicable best management practices set forth in either Forestry Best Management Practices for Water Quality in Virginia Technical Guide (Fourth Edition, July 2002) or Virginia Agricultural BMP Manual (2000), which facilitate compliance with the § 404(b)(1) Guidelines (40 CFR Part 230). Activities on areas lying fallow as part of a conventional, rotational cycle are part of an established operation.

b. Activities which bring a new area into agricultural or silvicultural use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If the activity takes place outside surface waters, it does not need a VWP permit, whether or not it is part of an established agriculture or silviculture operation.

c. For the purposes of this subdivision 8, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) "Cultivating" means physical methods of soil treatment employed within established agriculture and silviculture lands on farm or forest crops to aid and improve their growth, quality, or yield.

(2) "Harvesting" means physical measures employed directly upon farm, forest, or crops within established agricultural and silviculture lands to bring about their removal from farm or forest land, but does not include the construction of farm or forest roads.

(3) "Minor drainage" means:

(a) The discharge of dredged or fill material incidental to connecting upland drainage facilities to surface waters, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops;

(b) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, or other wetland crop species, where these activities and the discharge occur in surface waters which are in established use for such agricultural and silviculture wetland crop production;

(c) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments that have been constructed in accordance with applicable requirements of the Clean Water Act, and that are in established use for the production of rice, or other wetland crop species;

(d) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exclusion; and

(e) Minor drainage in surface waters is limited to drainage within areas that are part of an established agriculture or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a nonwetland (for example, wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to agriculture). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting surface water. Any discharge of dredged or fill material into surface water incidental to the construction of

any such structure or waterway requires a VWP permit, unless otherwise excluded or exempted by this chapter.

(4) "Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm or forest land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of surface water to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities does not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(5) "Seeding" means the sowing of seed and placement of seedlings to produce farm or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

9. Discharges of dredged or fill material into wetlands when addressed under a U.S. Army Corps of Engineers Regional, General, or Nationwide Permit and that meet the provisions of subdivision 10 a of this section.

10. Construction or maintenance of farm ponds or impoundments, stock ponds or impoundments, or irrigation ditches, or the maintenance (but not construction) of drainage ditches.

a. The exclusion for the construction and maintenance of farm or stock ponds and farm or stock impoundments applies to those structures that are operated for normal agricultural or silvicultural purposes, and are less than 25 feet in height or create a maximum impoundment capacity smaller than 100 acre-feet.

b. The exclusion for the construction and maintenance of farm or stock ponds and farm or stock impoundments does not include the impacts associated with the withdrawal of surface water from, within, or behind such structures. A VWP permit may be required for the surface water withdrawal.

c. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion.

d. The maintenance dredging of existing ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the average dimensions of the original ditch. This exclusion does not apply to the construction of new ditches or to the channelization of streams.

11. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with applicable best management practices (BMPs) set forth in either Forestry Best Management Practices for Water Quality in Virginia, Technical Guide, Fourth Edition, July 2002, or Virginia Agricultural BMP Manual, 2000, to ensure that flow and circulation patterns and chemical and biological characteristics of surface waters are not impaired, that the reach of such waters is not reduced, and that any adverse effect on the aquatic environment will otherwise be minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

- a. Permanent roads (for agriculture or forestry activities), temporary access roads (for mining, forestry, or farm purposes), and skid trails (for logging) in surface waters shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific agriculture, silviculture or mining operations, and local topographic and climatic conditions;
- b. All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into surface waters;
- c. The road fill shall be bridged, piped, culverted, or otherwise designed to prevent the restriction of expected flood flows;
- d. The fill shall be properly stabilized and maintained to prevent erosion during and following construction;
- e. Discharges of dredged or fill material into surface waters to construct road fill shall be made in a manner which minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within state waters (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;
- f. In designing, constructing, and maintaining roads, vegetative disturbance in surface waters shall be kept to a minimum;

- g. The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;
- h. Borrow material shall be taken from upland sources whenever feasible;
- i. The discharge shall not take, or jeopardize the continued existence of a state- or federally-listed threatened or endangered species as defined under the Endangered Species Act (16 USC § 1531 et seq.), in § 29.1-566 of the Code of Virginia and in 4VAC15-20-130 B and C, except as provided in § 29.1-568 of the Code of Virginia, or adversely modify or destroy the critical habitat of such species;
- j. Discharges into the nesting and breeding areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical on-site or off-site alternatives exist;
- k. The discharge shall not be located in proximity of a public water supply or intake;
- l. The discharge shall not occur in areas of concentrated shellfish production;
- m. The discharge shall not occur in a component to the National Wild and Scenic River System;
- n. The discharge material shall consist of suitable material free from toxic pollutants in toxic amounts; and
- o. All temporary fills shall be removed in their entirety and the area restored to its original elevation.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 1.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-65. Administrative continuance.

A. Administrative continuance provisions shall apply to all VWP permits.

B. When the permittee has submitted a timely and complete application for reissuance of an existing VWP individual permit, but through no fault of the permittee, the board does not reissue

or reissue with conditions a VWP individual permit or the board does not provide notice of its tentative decision to deny the application before an existing VWP individual permit expires, the conditions of the expiring VWP individual permit shall be administratively continued in full force and effect until the effective date of a reissued permit or the date on which the board denies the application. Complete application requirements for a VWP individual permit are located in 9VAC25-210-80 and 9VAC25-210-340. Timely application shall be a minimum of 180 days for an individual permit or a minimum of 270 days for an individual permit for a surface water withdrawal, unless otherwise specified in the existing permit.

C. Administrative continuance of a specific VWP general permit shall be in accordance with the corresponding VWP general permit regulation.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-70. Effect of a VWP permit.

A. As to the permitted activity, compliance with a VWP permit constitutes compliance with the VWP permit requirements of the Law and regulations.

B. The issuance of a VWP permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize injury to private property or any invasion of personal rights or any infringement of federal, state, or local laws or regulations.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 1.7, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 32, Issue 21, eff. August 2, 2016.

Part II
VWP Permit Application and Development

9VAC25-210-75. (Repealed.)

Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007; repealed, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-80. Application for a VWP permit.

A. Application for a VWP Permit. Any person who is required to obtain a VWP permit, except those persons applying for an emergency VWP permit for a public water supply emergency, shall submit a complete VWP permit application to the Department of Environmental Quality through the most current Joint Permit Application procedures established within each type of Joint Permit Application. The Virginia Department of Transportation (VDOT) may use its Interagency Coordination Meeting (IACM) process for submitting JPAs. There shall be no commencement of any activity subject to this chapter prior to the issuance of a VWP permit or granting VWP general permit coverage.

B. Informational requirements for all VWP individual permit applications are identified in this subsection with the exception of applications for emergency VWP permits to address a public water supply emergency, for which the information required in 9VAC25-210-340 C shall be submitted. In addition to the information in this subsection, applications involving a surface water withdrawal or a Federal Energy Regulatory Commission (FERC) license or relicense associated with a surface water withdrawal shall also submit the information required in 9VAC25-210-340 B.

1. A complete application for a VWP individual permit, at a minimum, consists of the following information, if applicable to the project:
 - a. The applicant's legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number.
 - b. If different from applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.

- c. If applicable, the authorized agent's name, mailing address, telephone number, and if applicable, fax number and electronic mail address.
- d. Project name and proposed project schedule. This schedule will be used to determine the VWP permit term.
- e. The following information for the project site location, and any related permittee-responsible compensatory mitigation site:
 - (1) The physical street address, nearest street, or nearest route number; city or county; zip code; and if applicable, parcel number of the site or sites.
 - (2) Name of the impacted water body or water bodies, or receiving waters, as applicable, at the site or sites.
 - (3) The latitude and longitude to the nearest second at the center of the site or sites.
 - (4) The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site or sites.
 - (5) A detailed map depicting the location of the site or sites, including the project boundary and existing preservation areas on the site or sites. The map (e.g., a U.S. Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site or sites for inspection.
- f. A narrative description of the project, including project purpose and need.
- g. An alternatives analysis for the proposed project detailing the specific on-site and off-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230. Avoidance and minimization includes, but is not limited to, the specific on-site and off-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.

h. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters and any physical alteration to surface waters. Surface water impacts shall be identified as follows:

(1) Wetland impacts identified according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested); and for each classification, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

(2) Individual stream impacts (i) quantified by length in linear feet to the nearest whole number and by average width in feet to the nearest whole number; (ii) quantified in square feet to the nearest whole number; and (iii) when compensatory mitigation is required, the impacts identified according to the assessed type using the Unified Stream Methodology.

(3) Open water impacts identified according to type; and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

(4) A copy of the approved jurisdictional determination when available, or when unavailable, (i) the preliminary jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ or (ii) other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable jurisdictional surface waters, including wetlands data sheets if applicable.

(5) A delineation map that (i) depicts the geographic area or areas of all surface water boundaries delineated in accordance with 9VAC25-210-45 and confirmed in accordance with the jurisdictional determination process; (ii) identifies such areas in accordance with subdivisions 1 h (1), 1 h (2), and 1 h (3) of this subsection; and (iii) quantifies and identifies any other surface waters according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) or similar terminology.

i. Plan view drawing or drawings of the project site sufficient to assess the project, including at a minimum the following:

- (1) North arrow, graphic scale, and existing and proposed topographic or bathymetric contours.
- (2) Limits of proposed impacts to surface waters.
- (3) Location of all existing and proposed structures.
- (4) All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification (i.e., emergent, scrub-shrub, or forested) for those surface waters and waterway name, if designated; ebb and flood or direction of flow; ordinary high water mark in nontidal areas; tidal wetlands boundary; and mean low water and mean high water lines in tidal areas.
- (5) The limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant, and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830).
- (6) The limits of any areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas).

j. Cross-sectional and profile drawing or drawings. Cross-sectional drawing or drawings of each proposed impact area includes at a minimum a graphic scale, existing structures, existing and proposed elevations, limits of surface water areas, ebb and flood or direction of flow (if applicable), ordinary high water mark in nontidal areas, tidal wetland boundary, mean low water and mean high water lines in tidal areas, impact limits, and location of all existing and proposed structures. Profile drawing or drawings with this information may be required on a case-by-case basis to demonstrate minimization of impacts. Any application that proposes piping or culverting stream flows shall provide a longitudinal profile of the pipe or culvert position and stream bed thalweg, or shall provide spot elevations of the stream thalweg at the beginning and end of the pipe or culvert, extending to a minimum of 10 feet beyond the limits of the proposed impact.

k. Materials assessment. Upon request by the board, the applicant shall provide evidence or certification that the material is free from toxic contaminants prior to disposal or that the dredging activity will not cause or contribute to a violation of water quality standards during dredging. The applicant may be required to conduct

grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.

l. An assessment of potential impacts to federal and state listed threatened or endangered species, including any correspondence or documentation from federal or state resource agencies addressing potential impacts to listed species.

m. A compensatory mitigation plan to achieve no net loss of wetland acreage and functions or stream functions and water quality benefits.

(1) If permittee-responsible compensation is proposed for wetland impacts, a conceptual wetland compensatory mitigation plan shall be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of replacement of wetland acreage and functions; (ii) a detailed location map including latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) a hydrologic analysis including a draft water budget for nontidal areas based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year; (v) groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; (vi) wetland delineation confirmation, data sheets, and maps for existing surface water areas on the proposed site or sites; (vii) a conceptual grading plan; (viii) a conceptual planting scheme including suggested plant species and zonation of each vegetation type proposed; (ix) a description of existing soils including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; (x) a draft design of water control structures; (xi) inclusion of buffer areas; (xii) a description of any structures and features necessary for the success of the site; (xiii) the schedule for compensatory mitigation site construction; and (xiv) measures for the control of undesirable species.

(2) If permittee-responsible compensation is proposed for stream impacts, a conceptual stream compensatory mitigation plan shall be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of water quality benefits and replacement of stream functions; (ii) a detailed location map including the latitude and longitude to the

nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) the proposed stream segment restoration locations including plan view and cross-section drawings; (v) the stream deficiencies that need to be addressed; (vi) data obtained from a DEQ-approved, stream impact assessment methodology such as the Unified Stream Methodology; (vii) the proposed restoration measures to be employed including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; (viii) reference stream data, if available; (ix) inclusion of buffer areas; (x) schedule for restoration activities; and (xi) measures for the control of undesirable species.

(3) For any permittee-responsible compensatory mitigation, the conceptual compensatory mitigation plan shall also include a draft of the intended protective mechanism or mechanisms, in accordance with 9VAC25-210-116 B 2, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 et seq. of the Code of Virginia) or the Virginia Open-Space Land Act (§ 10.1-1700 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument. The draft intended protective mechanism shall contain the information in subdivisions (a), (b), and (c) of this subdivision B 1 m (3) or in lieu thereof shall describe the intended protective mechanism or mechanisms that contain or contains the information required as follows:

- (a) A provision for access to the site;
- (b) The following minimum restrictions: no ditching, land clearing, or discharge of dredge or fill material, and no activity in the area designated as compensatory mitigation area with the exception of maintenance; corrective action measures; or DEQ-approved activities described in the approved final compensatory mitigation plan or long-term management plan; and
- (c) A long-term management plan that identifies a long-term steward and adequate financial assurances for long-term management in accordance with the current standard for mitigation banks and in-lieu fee program sites, except that financial assurances will not be necessary for permittee-

responsible compensation provided by government agencies on government property. If approved by DEQ, permittee-responsible compensation on government property and long-term protection may be provided through federal facility management plans, integrated natural resources management plans, or other alternate management plans submitted by a government agency or public authority.

(4) Any compensatory mitigation plan proposing the purchase of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased and documentation from the approved bank or in-lieu fee program sponsor of the availability of credits at the time of application.

n. A written description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensatory mitigation areas located within the proposed project boundary or permittee-responsible compensatory mitigation areas, that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas). Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant, and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830), as additional state or local requirements may apply if the project is located within an RPA.

o. Signature page that has been signed, dated, and certified by the applicant in accordance with 9VAC25-210-100. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. The application signature page, either on the copy submitted to the Virginia Marine Resources Commission or to DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

p. Permit application fee. The applicant will be notified by the board as to the appropriate fee for the project in accordance with 9VAC25-20. The board will

continue to process the application, but the fee must be received prior to release of a draft VWP permit.

2. Reserved.

C. An analysis of the functions of wetlands proposed to be impacted may be required by DEQ. When required, the method selected for the analysis shall assess water quality or habitat metrics and shall be coordinated with DEQ in advance of conducting the analysis.

1. No analysis shall be required when:

- a. Wetland impacts per each single and complete project total 1.00 acre or less; or
- b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent, or higher.

2. Analysis shall be required when wetland impacts per each single and complete project total 1.01 acres or more, and when any of the following applies:

- a. The proposed compensatory mitigation consists of permittee-responsible compensatory mitigation, including water quality enhancements as replacement for wetlands; or
- b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at less than the standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent.

D. Incomplete application. Where an application is not accepted as complete by the board within 15 days of receipt, the board shall require the submission of additional information from the applicant and may suspend processing of any application until such time as the applicant has supplied the requested information and the board considers the application complete. Where the applicant becomes aware that he omitted one or more relevant facts from a VWP permit application or submitted incorrect information in a VWP permit application or in any report to the board, the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application for purpose of review but shall not require an additional notice or an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after 60 days from the date of the latest written information request made by the board. An applicant may request a suspension of application review by the board. A submission by the applicant making such a request shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit

application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an additional permit application fee and may be subject to additional noticing requirements.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-90. Conditions applicable to all VWP permits.

A. Duty to comply. The permittee shall comply with all conditions and limitations of the VWP permit. Nothing in this chapter shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations, toxic standards, and prohibitions. Any VWP permit violation or noncompliance is a violation of the Clean Water Act and State Water Control Law and is grounds for enforcement action, VWP permit termination, VWP permit revocation, VWP permit modification, or denial of an application for a VWP permit extension or reissuance.

B. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which a VWP permit has been granted in order to maintain compliance with the conditions of the VWP permit.

C. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any impacts in violation of the VWP permit that may have a reasonable likelihood of adversely affecting human health or the environment.

D. Inspection and entry. Upon presentation of credentials, the permittee shall allow the board or any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to conduct the actions listed in this section. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

1. Enter upon permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;

2. Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; and
3. Sample or monitor any substance, parameter, or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law.

E. Duty to provide information. Plans, maps, conceptual reports, and other relevant information shall be submitted as required by the board prior to commencing construction.

F. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.
2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP permit, and records of all data used to complete the application for the VWP permit, for a period of at least three years from the date of permit expiration. This period may be extended by request of the board at any time.
4. Records of monitoring information shall include as appropriate:
 - a. The date, exact place and time of sampling or measurements;
 - b. The name of the individuals who performed the sampling or measurements;
 - c. The date and time the analyses were performed;
 - d. The name of the individuals who performed the analyses;
 - e. The analytical techniques or methods supporting the information such as observations, readings, calculations and bench data used;
 - f. The results of such analyses; and
 - g. Chain of custody documentation.

G. Duty to reapply. Any permittee desiring to continue a previously permitted activity after the expiration date of the VWP permit shall apply for and obtain a new permit or, if applicable, shall request an extension in accordance with 9VAC25-210-180.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-100. Signatory requirements.

A. Application. Any application for a VWP permit under this chapter shall bear the applicant's signature or the signature of a person acting in the applicant's behalf, with the authority to bind the applicant. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

B. Reports. All reports required by VWP permits and other information requested by the board shall be signed by:

1. One of the persons described in subsection A of this section; or
2. A duly authorized representative of that person. A person is a duly authorized representative only if:
 - a. The authorization is made in writing by a person described in subsection A of this section; and
 - b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, superintendent, or position of equivalent responsibility. A duly authorized representative may thus be either a named individual or any individual occupying a named position.
 - c. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization must be submitted to the board prior to or together with any separate information, or applications to be signed by an authorized representative.

C. Certification of application and reports. Any person signing a document under subsection A or B of this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the

information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.3, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-110. Establishing applicable standards, limitations, or other VWP permit conditions.

A. In addition to the conditions established in 9VAC25-210-90 and 9VAC25-210-100, and for surface water withdrawals in 9VAC25-210-370, each VWP permit shall include conditions meeting the requirements established in this section where applicable.

B. Water quality standards and state requirements. The VWP permit shall include requirements to comply with all appropriate provisions of state laws and regulations.

C. Toxic pollutants.

1. Where the board finds that appropriate limitations may not ensure compliance with the law or state water quality standards the board shall require the permittee to follow a program of biological or chemical toxics monitoring. The requirement may include a VWP permit reopener to allow the imposition of toxicity reduction or elimination measures determined to be necessary as a result of the board's evaluation of the results of the toxic monitoring and other available information. Based upon this determination, appropriate limitations will be included in the VWP permit to ensure the reduction or elimination of toxic pollutants and allow the board to ensure that the proposed project will comply with water quality standards and other appropriate requirements of the law.

2. Limitations will be included in the VWP permit to control all toxic pollutants which the board determines (based on information reported in a VWP permit application or a

notification or on other information) are or may be discharged at a level which would adversely affect the beneficial use of the receiving waters.

D. Monitoring requirements as conditions of VWP permits may include but are not limited to:

1. Requirements concerning the proper use, maintenance and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate) when required as a condition of the VWP permit;
2. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity and including, when appropriate, continuous monitoring and composite samples;
3. Applicable reporting requirements based upon the impact of the regulated activity on water quality; and
4. Requirements to report monitoring results with a frequency dependent on the nature and effect of the regulated activity.

E. Best management practices (BMPs). The VWP permit may require the use of BMPs to control or abate the discharge of pollutants.

F. Reissued VWP permits. When a VWP permit is renewed or reissued, limitations, standards, or conditions must be in conformance with current limitations, standards, or conditions.

G. Reopening VWP permits. Each VWP permit shall have a condition allowing the reopening of the VWP permit for the purpose of modifying the conditions of the VWP permit to meet new regulatory standards duly adopted by the board. Cause for reopening VWP permits includes, but is not limited to when the circumstances on which the previous VWP permit was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change, since the time the VWP permit was issued and thereby constitute cause for VWP permit modification or revocation and reissuance.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.4, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Errata, 17:3 VA.R. 433 October 23, 2000; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-115. (Repealed.)

Historical Notes

Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001; amended, Virginia Register Volume 23, Issue 21, eff. July 25, 2007; repealed, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-116. Compensation.

A. No net loss. Compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters. Compensatory mitigation ratios appropriate for the type of aquatic resource impacted and the type of compensation provided shall be applied to permitted impacts to help meet this requirement. Credit may be given for preservation of upland buffers already protected under other ordinances to the extent that additional protection and water quality and fish and wildlife resource benefits are provided.

B. Practicable and ecologically preferable compensation alternatives.

1. An analysis shall be required to justify that permittee-responsible compensatory mitigation is ecologically preferable to the purchase of mitigation bank credits or in-lieu fee program credits, if such credits are available in sufficient quantity for the project at the projected time of need. The analysis shall address the ability of the permittee-responsible compensatory mitigation site or sites to replace lost wetland acreage and functions or lost stream functions and water quality benefits. The analysis comparing the impacted and compensation site or sites may use a method that assesses water quality or habitat metrics, such as that required by 9VAC25-210-80 C, or a method that assesses such criteria as water quality benefits, distance from impacts, hydrologic source and regime, watershed, vegetation type, soils, constructability, timing of compensation versus impact, property acquisition, and cost.

2. The applicant shall demonstrate that permittee-responsible compensatory mitigation can be protected in perpetuity through a protective mechanism approved by the Department of Environmental Quality, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 et seq. of the Code of Virginia) or the Virginia Open-Space Act (§ 10.1-

1700 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument.

C. Compensatory mitigation proposals shall be evaluated as follows:

1. The purchase of mitigation bank credits and in-lieu fee program credits when available shall in most cases be deemed the ecologically preferable form of compensation for project impacts. However, permittee-responsible compensatory mitigation may be considered when the applicant satisfactorily demonstrates that permittee-responsible compensatory mitigation is ecologically preferable in accordance with subdivision B 1 of this section.

2. Compensatory mitigation for unavoidable wetland impacts may be met through the following options, which are preferred in the following sequence: mitigation banking, in-lieu fee program, and permittee-responsible compensatory mitigation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland acreage and functions and the greatest likelihood of success. When considering options for providing the required compensatory mitigation, DEQ shall consider the type and location options in the following order:

- a. Mitigation bank credits;
- b. In-lieu fee program credits;
- c. Permittee-responsible mitigation under a watershed approach;
- d. Permittee-responsible mitigation through on-site and in-kind mitigation;
- e. Permittee-responsible mitigation through off-site or out-of-kind mitigation;
- f. Restoration, enhancement, or preservation of upland buffers adjacent to wetlands when utilized in conjunction with subdivision 2 a, 2 b, 2 c, 2 d, or 2 e of this subsection and when consistent with subsection A of this section; and
- g. Preservation of wetlands when utilized in conjunction with subdivision 2 a, 2 b, 2 c, 2 d, or 2 e of this subsection and when consistent with subsection A of this section.

3. Compensatory mitigation for unavoidable stream impacts may be met through the following options, which are preferred in the following sequence: mitigation banking, in-lieu fee program, and permittee-responsible mitigation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of stream functions and water quality benefits and the

greatest likelihood of success. One factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board. When considering options for providing the required compensatory mitigation, DEQ shall consider the type and location options in the following order:

- a. Mitigation bank stream credits;
 - b. In-lieu fee program credits;
 - c. Permittee-responsible mitigation under a watershed approach;
 - d. Permittee-responsible mitigation through on-site and in-kind mitigation;
 - e. Permittee-responsible mitigation through off-site or out-of-kind mitigation;
 - f. Restoration, enhancement, or preservation of upland buffers adjacent to streams when utilized in conjunction with subdivision 3 a, 3 b, 3 c, 3 d, or 3 e of this subsection and when consistent with subsection A of this section; and
 - g. Preservation of stream channels and adjacent riparian buffers when utilized in conjunction with subdivision 3 a, 3 b, 3 c, 3 d, or 3 e of this subsection and when consistent with subsection A of this section.
4. Compensatory mitigation for open water impacts may be required to protect state waters and fish and wildlife resources from significant impairment, as appropriate. Compensation shall not be required for permanent or temporary impacts to open waters that are identified as palustrine by the Cowardin classification method, but compensation may be required when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.

D. In-lieu fee program approval.

1. The board may approve the use of a program by issuing a VWP permit for a specific project or by taking an enforcement action and following applicable public notice and comment requirements, or by granting approval of a program after publishing a notice of its intent in the Virginia Register of Regulations and accepting public comments on its approval for a minimum of 30 days.
2. Where a program is mandated by the Code of Virginia to be implemented and such program is approved by the U.S. Army Corps of Engineers, the program may be used as deemed appropriate for any VWP permit or enforcement action.
3. An approved program must meet the following criteria:

- a. Demonstration of a no net loss policy in terms of wetland acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for restoration, creation, enhancement, or preservation;
 - b. DEQ approval of each site for inclusion in the program;
 - c. A commitment to provide annual reports to the board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the compensatory mitigation credits contributed for each watershed of project impact;
 - d. A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland acreage and functions or stream functions and water quality benefits lost in the impacted watershed; and
 - e. Such terms and conditions as the board deems necessary to ensure a no net loss of wetland acreage and functions or stream functions and water quality benefits from permitted projects providing compensatory mitigation.
4. Approval may be granted for up to 10 years and may be renewed by the board upon a demonstration that the program has met the criteria in subdivision 3 of this subsection.
- E. Use of mitigation banks. The use of mitigation banks for compensating project impacts shall be deemed appropriate if the following criteria are met:
1. The bank meets the criteria and conditions found in § 62.1-44.15:23 of the Code of Virginia;
 2. The bank is ecologically preferable to practicable on-site and off-site individual compensatory mitigation options;
 3. The banking instrument, if approved after July 1, 1996, has been approved by a process that involved public review and comment in accordance with federal guidelines; and
 4. The applicant provides verification to DEQ of purchase of the required amount of credits.
- F. For permittee-responsible mitigation, the final compensatory mitigation plan shall include complete information on all components of the conceptual compensatory mitigation plan detailed in 9VAC25-210-80 B 1 m and:
1. For wetlands, the final compensation plan for review and approval by DEQ shall also include a summary of the type and acreage of existing wetland impacts anticipated

during the construction of the compensation site and the proposed compensation for these impacts; a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location of photo-monitoring stations, monitoring wells, vegetation sampling points, and reference wetlands or streams if available; an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and the final protective mechanism for the compensation site or sites, including all surface waters and buffer areas within its boundaries. The approved protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to DEQ prior to commencing impacts in surface waters.

2. For streams, the final compensation plan for review and approval by DEQ shall also include a site access plan; an erosion and sedimentation control plan, if appropriate; an abatement and control plan for undesirable plant species; a monitoring plan, including a monitoring and reporting schedule, monitoring design, and methodologies for success; proposed success criteria; location of photo-monitoring stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams; a plan view drawing depicting the pattern and all compensation measures being employed; a profile drawing; cross-sectional drawing or drawings of the proposed compensation stream; and the final protective mechanism for the compensation site or sites, including all surface waters and buffer areas within its boundaries. The approved protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to DEQ prior to commencing impacts in surface waters.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007; amended, Virginia Register Volume 24, Issue 9, eff. February 6, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-120. Draft VWP permit formulation.

A. After evaluation of a complete application, the board shall make a decision to tentatively issue or deny the VWP permit pursuant to this section.

B. If the tentative decision is to issue the VWP permit then a draft VWP permit shall be prepared in advance of public notice. The following tentative determinations shall be incorporated into a draft VWP permit:

1. Conditions, discharge limitations, standards and other requirements applicable to the VWP permit;
2. Monitoring requirements; and
3. Requirements for mitigation of adverse environmental impacts.

C. If the tentative decision is to deny the application, the board shall do so in accordance with 9VAC25-210-230.

D. Should a decision be made to waive the requirement for a VWP permit, the board shall do so in accordance with 9VAC25-210-220.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.5, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

9VAC25-210-130. VWP general permits.

A. The board may issue VWP general permits by regulation for certain specified categories of activities as it deems appropriate.

B. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require individual applications and VWP individual permits rather than approving coverage under a VWP general permit regulation. Cases where an individual VWP permit may be required include the following:

1. Where the activity may be a significant contributor to pollution;
2. Where the applicant or permittee is not in compliance with the conditions of the VWP general permit regulation or coverage;
3. When an applicant or permittee no longer qualifies for coverage under the VWP general permit; and
4. When a permittee operating under VWP general permit coverage requests to be excluded from coverage by applying for a VWP individual permit.

C. When a VWP individual permit is issued to a permittee, the applicability of the VWP general permit coverage to the individual permittee is automatically terminated on the effective date of the VWP individual permit.

D. When a VWP general permit regulation is issued which applies to a permittee that is already covered by a VWP individual permit, such person may request exclusion from the provisions of the VWP general permit regulation and subsequent coverage under a VWP individual permit.

E. VWP general permit coverage may be revoked from an individual permittee for any of the reasons set forth in 9VAC25-210-180 subject to appropriate opportunity for a hearing.

F. The permittee shall be required to submit a written notice of project completion and request a permit termination by consent within 30 days following the completion of all activities in all permitted impact areas in accordance with subsection 90 A of the applicable VWP general permit regulation.

G. Activities authorized under a VWP general permit and general permit regulation shall be authorized for the fixed term stated in the applicable VWP general permit and VWP general permit regulation.

H. The board may certify or certify with conditions a general, regional, or nationwide permit proposed by the U.S. Army Corps of Engineers (USACE) in accordance with § 401 of the federal Clean Water Act as meeting the requirements of this chapter and a VWP general permit, provided that the nationwide or regional permit and the certification conditions:

1. Require that wetland or stream impacts be avoided and minimized to the maximum extent practicable;
2. Prohibit impacts that cause or contribute to a significant impairment of state waters or fish and wildlife resources;
3. Require compensatory mitigation sufficient to achieve no net loss of existing wetland acreage and functions or stream functions and water quality benefits; and
4. Require that compensatory mitigation for unavoidable wetland impacts be provided in accordance with 9VAC25-210-116.
5. Require that compensatory mitigation for unavoidable stream impacts be provided in accordance with 9VAC25-210-116, including but not limited to an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board.

I. The certifications allowed by subsection H of this section may be provided only after the board has advertised and accepted public comment on its intent to provide certification for at least 30 days.

J. Coverage under a general, regional, or nationwide permit promulgated by the USACE and certified by the board in accordance with this section shall be deemed coverage under a VWP general permit regulation upon submission of proof of coverage under the general, regional, or nationwide permit and any other information required by the board through the certification process. Notwithstanding the provisions of 9VAC25-20, no fee shall be required from applicants seeking coverage under this subsection.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008; Errata, 25:9 VA.R. 1826 January 5, 2009; amended, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

Part III

Public Involvement

9VAC25-210-140. Public notice of VWP individual permit actions and public comment periods.

A. Every draft VWP individual permit, with the exception of a VWP Emergency Virginia Water Protection Permit, shall be given public notice paid for by the applicant, by publication once in a newspaper of general circulation in the area affected by the proposed activity. The public notice must be published within 14 days of the applicant's receipt of a draft VWP permit, or the 120-day VWP permit processing timeframe will be suspended until such publication.

B. The board shall provide a comment period of at least 30 days following the date of the public notice for interested persons to submit written comments on the tentative decision and to request a public hearing on the VWP permit. All written comments submitted during the comment period shall be retained by the board and considered during its final decision on the VWP permit.

C. The contents of the public notice for a VWP permit application or proposed VWP permit action shall include:

1. Name and mailing address of the applicant;
2. The permit application number;
3. Project location. If the location of the activity differs from the address of the applicant the notice shall also state the location in sufficient detail such that the specific location may be easily identified;
4. Brief description of the business or activity to be conducted at the site of the proposed activity;
5. Description of the area affected. Information on the number of acres of wetlands and the number of linear feet of streams affected, as well as the name of the receiving waterway and the name of the affected watershed should be included;
6. Description of what the applicant plans to do to compensate for the affected area;
7. A statement of the tentative determination to issue or deny a VWP permit;
8. A brief description of the final determination procedure;
9. The address, email address and phone number of a specific person or persons at the state office from whom further information may be obtained; and
10. A brief description on how to submit comments and request a public hearing.

D. Public notice shall not be required for submission or approval of plans and specifications or conceptual engineering reports not required to be submitted as part of the application.

E. When a VWP permit is denied, the board shall do so in accordance with 9VAC25-210-230.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 3.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-150. Public access to information.

All information (i) pertaining to VWP permit or VWP general permit coverage processing or (ii) in reference to any activity requiring a VWP permit or VWP general permit coverage under this chapter shall be available to the public, unless prohibited by § 62.1-44.21 of the Code of Virginia. All information claimed confidential must be identified as such at the time of submission to the board and the Virginia Marine Resources Commission.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 3.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-160. Public comments and hearing.

A. The board shall consider all written comments and requests for a public hearing received during the VWP individual permit comment period and shall make a determination on the necessity of a public hearing in accordance with § 62.1-44.15:02 of the Code of Virginia. All proceedings, public hearings and decisions from it will be in accordance with § 62.1-44.15:02 of the Code of Virginia.

B. Should the board, in accordance with § 62.1-44.15:02 of the Code of Virginia, determine to dispense with the public hearing, it may grant the VWP individual permit or, at its discretion, transmit the application or request, together with all written comments from it and relevant staff documents and staff recommendations, if any, to the board for its decision.

C. Any applicant or permittee aggrieved by an action of the board taken without a public hearing, or inaction of the board, may request in writing a hearing pursuant to § 62.1-44.15:02 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 3.3, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-170. Public notice of hearing.

A. Public notice of any public hearing held pursuant to 9VAC25-210-160 shall be circulated as follows:

1. Notice shall be published once in a newspaper of general circulation in the county or city where the activity is to occur; and
2. Notice of the public hearing shall be sent to all persons and government agencies that received a copy of the notice of VWP permit application and to those persons requesting a public hearing or having commented in response to the public notice.

B. Notice shall be effected pursuant to subdivisions A 1 and 2 of this section at least 30 days in advance of the public hearing.

C. The content of the public notice of any public hearing held pursuant to 9VAC25-210-160 shall include at least the following:

1. Name and mailing address of each person whose application will be considered at the public hearing and a brief description of the person's activities or operations including information on the number of acres of wetlands and the number of linear feet of streams affected, a description of the nature of the withdrawal and the amount of the withdrawal; as well as the name of the receiving waterway and the name of the affected watershed;
2. The precise location of the proposed activity and the surface waters that will, or may, be affected including, where possible, reference to route numbers, road intersections, map coordinates or similar information;
3. Description of what the applicant plans to do to compensate for the affected area;
4. A brief reference to the public notice issued for the VWP permit application or permit action, including the permit application number and date of issuance, unless the public notice includes the public hearing notice;
5. Information regarding the time and location for the public hearing;
6. The purpose of the public hearing;
7. A concise statement of the relevant water quality, or fish and wildlife resource issues raised by the persons requesting the public hearing;
8. Contact person and the mailing address, email address, name of the Department of Environmental Quality regional office and phone number of the DEQ office at which the interested persons may obtain further information or request a copy of the draft VWP permit prepared pursuant to 9VAC25-210-120; and

9. A brief reference to the rules and procedures to be followed at the public hearing.

D. Public notice of any hearing held pursuant to 9VAC25-210-160 C shall be in accordance with § 62.1-44.15:02 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 3.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

Part IV

VWP Permit Modification, Revocation and Reissuance, Transfer, Termination and Denial

9VAC25-210-175. (Repealed.)

Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007; repealed, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-180. Rules for modification, revocation and reissuance, extension, transfer, and termination of VWP individual permits.

A. VWP individual permits may be modified in whole or in part, revoked and reissued, extended, transferred, or terminated only as authorized by this section.

B. VWP permits may be modified upon the request of the permittee or upon board initiative when any of the following developments occur:

1. When new information becomes available about the project or activity covered by the VWP permit, including project additions or alterations, that was not available at VWP permit issuance and would have justified the application of different VWP permit conditions at the time of VWP permit issuance;
2. When a change is made in the promulgated standards or regulations on which the VWP permit was based;
3. When changes occur that are subject to "reopener clauses" in the VWP permit; or

4. When developments applicable to surface water withdrawals as specified in 9VAC25-210-380 occur.

C. A request for a modification, except those addressed in subsection E of this section, shall include the applicable informational requirements of 9VAC25-210-80 B, updated to reflect the proposed changes to the project. The board may request additional information as necessary to review and prepare a draft permit. If the board tentatively decides to modify a permit, it shall prepare a draft permit incorporating the proposed changes in accordance with 9VAC25-210-120 and process the draft permit in accordance with 9VAC25-210-140 through 9VAC25-210-170.

D. During the drafting and authorization of a permit modification under this section, only those conditions to be modified shall be addressed with preparing a draft modified permit. VWP permit terms and conditions of the existing permit shall remain in full force and effect during the modification of the permit.

E. Upon request of the permittee, or upon board initiative with the consent of the permittee, minor modifications may be made in the VWP permit without following the public involvement procedures contained in 9VAC25-210-140, 9VAC25-210-160, or 9VAC25-210-170. Any request for a minor modification shall be in writing and shall contain the facts or reasons supporting the request. The board may request additional information as necessary to review a request for minor modification. The board, at its discretion, may require that the changes proposed under a minor modification to be processed as a modification in accordance with subsections B and C of this section. For VWP permits, a minor modification may only be processed to:

1. Correct typographical errors.
2. Require monitoring and reporting by the permittee at a different frequency than required in the VWP permit, based on new information justifying the change in conditions.
3. Change a compliance date provided it will not result in a net loss of wetland acreage or of functions in all surface waters.
4. Allow for a change in permittee provided that a written agreement containing a specific date for transfer of VWP permit responsibility, authorization, and liability from the current to the new permittee has been submitted to the board. A VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer, has been revoked and reissued to the new permittee, or has been automatically transferred. Any individual VWP permit shall be automatically transferred to a new permittee if the current permittee:

- a. Notifies the board of the proposed transfer of the permit and provides a written agreement between the current and proposed permittees containing the date of transfer of VWP permit responsibility, authorization, and liability to the new permittee; and
 - b. The board does not within 15 days notify the current and new permittees of its intent to modify the VWP permit.
- 5. Change project plans or uses that do not result in a change to permitted project impacts other than allowable by subdivisions 6 and 7 of this subsection.
- 6. Reduce wetland or stream impacts. Compensatory mitigation requirements may be modified in relation to the adjusted impacts, provided that the adjusted compensatory mitigation meets the initial compensatory mitigation goals. The Department of Environmental Quality shall not be responsible for ensuring refunds for mitigation bank credit purchases or in-lieu fee program credit purchases.
- 7. Authorize additional impacts to surface waters that are proposed prior to impacting the additional areas. Proposed additional impacts shall meet the following requirements:
 - a. The proposed additional impacts are located within the project boundary as depicted in the application for permit issuance, or are located in areas of directly related off-site work.
 - b. The permittee has provided sufficient documentation that the board may reasonably determine that the additional impacts will not impact federal or state listed threatened or endangered species or designated critical habitat, or result in a taking of threatened or endangered species. The board recommends that the permittee verify that the project will not impact any proposed threatened or endangered species or proposed critical habitat.
 - c. The cumulative, additional permanent wetland or open water impacts for one or more minor modifications do not exceed one-quarter of an acre (0.25 acre or 10,890 square feet).
 - d. The cumulative, additional permanent stream impacts for one or more minor modifications do not exceed 100 linear feet.
 - e. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-210-80 B 1 g.

- f. Compensatory mitigation for the proposed impacts, if required, meets the requirements of 9VAC25-210-80 B 1 m and 9VAC25-210-116. Prior to a minor modification approval, DEQ may require submission of a compensatory mitigation plan for the additional impacts.
- g. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board that the area to be temporarily impacted will be restored to its preconstruction elevations and contours with topsoil from the impact area where practicable, such that the previous acreage and functions are restored. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 10 days of receipt of the request for authorization to temporarily impact additional surface waters.
8. Substitute a specific, DEQ-approved mitigation bank or in-lieu fee program with another DEQ-approved mitigation bank or in-lieu fee program, or substitute all or a portion of the prior authorized permittee-responsible compensatory mitigation with a purchase of mitigation credits in accordance with 9VAC25-210-116 C from a DEQ-approved mitigation bank or in-lieu fee program. The amount of credits proposed to be purchased shall be sufficient to meet the compensatory mitigation requirement for which the compensatory mitigation is proposed to replace.
9. Allow for extension of the expiration date of the VWP permit. Any permittee with an effective VWP permit for an activity that is expected to continue after the expiration date of the VWP permit, without any change in the activity authorized by the VWP permit other than as may be allowed under this section, shall submit written notification requesting an extension. The permittee must file the request 90 days prior to the expiration date of the VWP permit. VWP permit modifications shall not be used to extend the term of a VWP permit beyond 15 years from the date of original issuance.
10. Activities or development applicable to surface water withdrawals as specified in 9VAC25-210-380 B.

F. After notice and opportunity for a formal hearing pursuant to § 62.1-44.15:02 of the Code of Virginia, a VWP permit can be terminated for cause. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any condition of the VWP permit;

2. The permittee's failure in the application or during the VWP permit process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;
3. The permittee's violation of a special or judicial order;
4. A determination by the board that the permitted activity endangers human health or the environment and can be regulated to acceptable levels by VWP permit modification or termination;
5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP permit; or
6. A determination that the permitted activity has ceased and that the compensation for unavoidable adverse impacts has been successfully completed.

G. The board may terminate the permit without cause when the permittee is no longer a legal entity due to death, dissolution, or when a company is no longer authorized to conduct business in the Commonwealth. The termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:25 of the Code of Virginia and 9VAC25-230.

H. A VWP permit may be terminated by consent, as initiated by the permittee. The permittee shall submit a request for termination by consent within 30 days of completing or canceling all permitted activities and all required compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion. The director may accept this termination on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address, and telephone number;
2. Name and location of the activity;
3. The VWP permit number; and
4. One of the following certifications:
 - a. For project completion: "I certify under penalty of law that all activities and any required compensatory mitigation authorized by a VWP permit have been completed. I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit,

and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit, unless otherwise excluded from obtaining a permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit."

b. For project cancellation: "I certify under penalty of law that the activities and any required compensatory mitigation authorized by this VWP permit will not occur. I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit, unless otherwise excluded from obtaining a permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by DEQ, and the following certification statement: "I certify under penalty of law that the activities or the required compensatory mitigation authorized by this VWP permit have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit, unless otherwise excluded from obtaining a permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 4.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-185. Duration of VWP individual permits.

VWP permits issued under this chapter shall have an effective date and expiration date specified in the permit. The permit term shall be based upon the projected duration of the project, the length of any required monitoring, or other project operations or VWP permit conditions; however, the term shall not exceed 15 years, unless administratively continued. When a permit term, other than that of an Emergency Virginia Water Protection Permit, is less than 15 years, an extension of the permit terms and conditions may be granted in accordance with 9VAC25-210-180. Emergency Virginia Water Protection Permits shall not exceed a duration of one year or shall expire upon the issuance of a regular Virginia Water Protection Permit, whichever comes first.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001; amended, Virginia Register Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-190. (Repealed.)

Historical Notes

Derived from VR680-15-02 § 4.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 23, Issue 21, eff. July 27, 2007.

9VAC25-210-200. (Repealed.)

Historical Notes

Derived from VR680-15-02 § 4.3, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 23, Issue 21, eff. July 25, 2007.

9VAC25-210-210. (Repealed.)

Historical Notes

Derived from VR680-15-02 § 4.4, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 23, Issue 21, eff. July 25, 2007.

9VAC25-210-220. Waiver of VWP permit or § 401 certification.

A. The board may waive permitting requirements when the board determines that a proposed project impacts an isolated wetland that is of minimal ecological value as defined in 9VAC25-210-10. Upon request by the board, any person claiming this waiver shall demonstrate to the satisfaction of the board that he qualifies for the waiver.

B. The board may waive the requirement for a VWP individual permit when the proposed activity qualifies for a permit issued by the U.S. Army Corps of Engineers and receives a permit from the Virginia Marine Resources Commission or wetlands boards, pursuant to Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, and the activity does not impact instream flows.

C. The board shall not require coverage under a VWP general permit or a VWP individual permit when the proposed activity meets the exclusion set forth in subdivision 10 a of 9VAC25-210-60 regardless of the issuance of a permit by the U.S. Army Corps of Engineers.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 4.5, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 25, Issue 5, eff. December 10, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-230. Denial of the VWP permit or variance request.

A. The board shall make a decision to tentatively deny the VWP permit or variance request if the requirements of this chapter are not met. Basis for denial include, but are not limited to, the following:

1. The project will result in violations of water quality standards or will impair the beneficial uses of state waters.
2. As a result of project implementation, shellfish waters would be condemned in accordance with 9VAC25-260.
3. The project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable.

4. The proposed compensatory mitigation plan is insufficient or unsatisfactory for the proposed impacts and fails to achieve no net loss of existing wetland acreage and function and no net loss of functions in all surface waters.

5. The Department of Game and Inland Fisheries indicates that natural or stockable trout waters would be permanently and negatively impacted by the proposed activity.

6. The proposed activity is prohibited by 9VAC25-210-50.

7. The effect of project impacts, together with other existing or proposed impacts to wetlands, will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

8. Failure to submit the required permit fee in accordance with 9VAC25-210-80 B 1 g or 9VAC25-210-340 C 1 g.

9. The board determines that the applicant for an Emergency Virginia Water Protection Permit has not demonstrated that there is a substantial threat to public health and safety, and that normal Virginia Water Protection Permit procedures, including public comment provisions, should be followed.

B. The applicant shall be notified by letter of the board's preliminary decision to tentatively deny the VWP permit requested.

C. Should the applicant withdraw his application, no VWP permit or variance will be issued.

D. Should the applicant elect to proceed as originally proposed, the board may deny the application and advise the applicant pursuant to § 62.1-44.15:02 of the Code of Virginia of his right to a public hearing to consider the denial.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 4.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-240. (Repealed.)

Historical Notes

Derived from VR680-15-02 § 5.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-250. (Repealed.)

Historical Notes

Derived from VR680-15-02 § 6.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-260. (Repealed.)

Historical Notes

Derived from VR680-15-02 § 6.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

Part V

Surface Water Withdrawals

9VAC25-210-300. Definitions for surface water withdrawals.

The following words and terms when used in this part shall have the following meanings:

"Affected stream reach" means the portion of a surface water body beginning at the location of a withdrawal and ending at a point where effects of the withdrawal are not reasonably expected to adversely affect beneficial uses.

"Agricultural surface water withdrawal" means a withdrawal of surface water in Virginia or from the Potomac River for the purpose of agricultural, silvicultural, horticultural, or aquacultural operations. Agricultural surface water withdrawals include withdrawals for turf farm operations, but do not include withdrawals for landscaping activities, or turf installment and maintenance associated with landscaping activities.

"Consumptive use" means any use of water withdrawn from a surface water other than a nonconsumptive use.

"Drought" means the declaration of a drought stage by the Virginia Drought Coordinator or the Governor of Virginia for a particular area or locality within Virginia. Drought stage declarations include watch, warning, and emergency, depending upon severity, as defined by the Virginia Drought Assessment and Response Plan dated March 28, 2003.

"Drought of record" means the time period during which the most severe drought conditions occurred for a particular area or location, as indicated by the available hydrologic and meteorologic data.

"Emergency Virginia Water Protection Permit" means a Virginia Water Protection Permit issued pursuant to § 62.1-44.15:22 C of the Code of Virginia authorizing a new or increased surface water withdrawal to address insufficient public drinking water supplies that are caused by a drought and may result in a substantial threat to human health or public safety.

"Human consumption" means the use of water to support human survival and health, including drinking, bathing, showering, cooking, dishwashing, and maintaining hygiene.

"Instream flow" means the existing volume of water flowing in a stream or water body including any seasonal variations of water levels and flow.

"Intake structure" means any portion of a surface water withdrawal system used to withdraw surface water that is located within the surface water, such as, but not limited to, a pipe, culvert, hose, tube, or screen.

"Major river basin" means the Potomac-Shenandoah River Basin, the Rappahannock River Basin, the York River Basin, the James River Basin, the Chowan River Basin, the Roanoke River Basin, the New River Basin, or the Tennessee-Big Sandy River Basin.

"Nonconsumptive use" means the use of water withdrawn from a surface water in such a manner that it is returned to the surface water without substantial diminution in quantity at or near the point from which it was taken and would not result in or exacerbate low flow conditions.

"Potomac River Low Flow Allocation Agreement" means the agreement among the United States of America, the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitation Commission, and the Fairfax County Water Authority dated January 11, 1978, consented to by the United States Congress in § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986.

"Public water supply" means a withdrawal of surface water in Virginia or from the Potomac River for the production of drinking water, distributed to the general public for the purpose of, but not limited to, domestic use.

"Public water supply emergency" means a substantial threat to public health or safety due to insufficient public drinking water supplies caused by drought.

"Section for Cooperative Water Supply Operations on the Potomac" means a section of the Interstate Commission on the Potomac River Basin designated by the Water Supply Coordination Agreement as responsible for coordination of water resources during times of low flow in the Potomac River.

"Surface water withdrawal" means a removal or diversion of surface water in Virginia or from the Potomac River for consumptive or nonconsumptive use thereby altering the instream flow or hydrologic regime of the surface water. Projects that do not alter the instream flow or that alter the instream flow but whose sole purpose is flood control or stormwater management are not included in this definition.

"Surface water withdrawal system" means any device or combination of devices used to withdraw surface water such as, but not limited to, a machine, pump, culvert, hose, tube, screen, or fabricated concrete or metal structure.

"Variance" means a mechanism that allows temporary waiver of the generally applicable withdrawal limitation requirements or instream flow conditions of a VWP permit during a drought.

"Water Supply Coordination Agreement" means the agreement among the United States of America, the Fairfax County Water Authority, the Washington Suburban Sanitary Commission, the District of Columbia, and the Interstate Commission on the Potomac River Basin, dated July 22, 1982, which establishes agreement among the suppliers to operate their respective water supply systems in a coordinated manner and which outlines operating rules and procedures for reducing impacts of severe droughts in the Potomac River Basin.

"Water supply plan" means a document developed in compliance with 9VAC25-780.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 1.1, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-310. Exclusions from permits for surface water withdrawals.

A. The following surface water withdrawals are excluded from VWP permit requirements. Activities other than the surface water withdrawal that are contained in 9VAC25-210-50 and are associated with the construction and operation of the surface water withdrawal are subject to VWP permit requirements, unless excluded by 9VAC25-210-60. Other permits under state and federal law may be required.

1. Any surface water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal. To qualify for this exclusion, the surface water withdrawal shall be deemed to be in existence on July 1, 1989, if there was an actual withdrawal on or before that date and the withdrawal has not been abandoned.

a. Abandonment of a surface water withdrawal. A surface water withdrawal shall be deemed to be abandoned if the owner of the surface water withdrawal system (i) notifies the Department of Environmental Quality in writing that the withdrawal has been abandoned or (ii) removes or disables the surface water withdrawal system with the intent to permanently cease such withdrawal. Transfer of ownership or operational control of the surface water withdrawal system, a change in use of the water, or temporary cessation of the withdrawal shall not be deemed evidence of abandonment. The notification shall be signed by the owner of record or shall include evidence satisfactory to DEQ that the signatory is authorized to submit the notice on behalf of the owner of record. Evidence may include, but shall not be limited to, a resolution of the governing body of the owner or corporate minutes.

b. Information to be furnished to DEQ. Each owner or operator of a permanent surface water withdrawal system engaging in a withdrawal that is subject to this exclusion shall provide DEQ the estimated maximum capacity of the intake structure, the location of the existing intake structure, and any other information that may be required by the board. Each owner or operator of a temporary surface water withdrawal system engaging in a withdrawal that is subject to this exclusion, where the purpose of the withdrawal is for agriculture, shall provide to DEQ the maximum annual surface water withdrawal over the last 10 years. The information shall be provided within one year of the date that notice of such request is received from DEQ and shall be updated when the maximum capacity of the existing intake structure changes. The information provided to DEQ shall not constitute a limit on the

exempted withdrawal. Such information shall be utilized by DEQ and board to protect existing beneficial uses and shall be considered when evaluating applications for new withdrawal permits.

2. Any surface water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal received a § 401 certification before January 1, 1989, that authorized the installation of any necessary withdrawal structures to make such withdrawal. However, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.

3. Any existing lawful unpermitted surface water withdrawal initiated between July 1, 1989, and July 25, 2007, that has complied with the Water Withdrawal Reporting regulations (9VAC25-200) and that is not subject to other exclusions contained in this section. Any increase in that withdrawal above the limited amount identified in subdivision a of this subdivision A 3 shall require an application for a permit for the surface water withdrawal system.

a. The largest 12-consecutive month surface water withdrawal that occurred in the 10 years prior to July 25, 2007, shall constitute a limit on the withdrawal that is excluded from permit requirements. For agricultural surface water withdrawals that did not report annually as required by the Water Withdrawal Reporting regulations (9VAC25-200) prior to July 25, 2007, the limit excluded from permit requirements was established for the operations that were in existence during the 10 years prior to July 25, 2007, by estimating the largest 12-consecutive month withdrawal based upon the following information associated with that timeframe: the area irrigated, depth of irrigation, and annual number of irrigations; pumping capacity and annual pumping time; annual energy consumption for pumps; number and type of livestock watered annually; and number and type of livestock where water is used for cooling purposes.

b. All owners and operators of surface water withdrawals excluded from permit requirements by this section shall annually report withdrawals as required by the Water Withdrawal Reporting regulations (9VAC25-200). Failure to file annual reports either reporting actual withdrawals or the fact that withdrawals did not occur may result in the owner or operator being required to cease withdrawals, file an application, and receive a permit prior to resuming any withdrawal. Information regarding excluded withdrawal amounts shall be utilized by DEQ and the board to

protect existing beneficial uses and shall be considered when evaluating applications for new withdrawal permits.

4. Agricultural surface water withdrawals that total less than:
 - a. One million gallons in a single month from nontidal waters.
 - b. 60 million gallons in a single month from tidal waters.
5. Surface water withdrawals from tidal waters for nonconsumptive uses.
6. Surface water withdrawals from nontidal or tidal waters, regardless of the volume withdrawn, for the following uses:
 - a. Firefighting or for the training activities related to firefighting, such as dry hydrants and emergency surface water withdrawals.
 - b. Hydrostatic pressure testing of water tight containers, pipelines, and vessels.
 - c. Normal single-family home residential gardening and lawn and landscape maintenance.
7. Surface water withdrawals placed into portable containers by persons owning property on or holding easements to riparian lands.
8. Surface water withdrawals that return withdrawn water to the stream of origin; do not divert more than half of the instantaneous flow of the stream; have the withdrawal point and the return point not separated by more than 1,000 feet of stream channel; and have both banks of the affected stream segment located within one property boundary.
9. Surface water withdrawals from quarry pits that do not alter the physical, biological, or chemical properties of surface waters connected to the quarry pit.
10. Surface water withdrawals from a privately owned agriculture pond, emergency water storage facility, or other water retention facility, provided that such pond or facility is not placed in the bed of a perennial or intermittent stream or wetland. Surface water withdrawals from such facilities constructed in beds of ephemeral streams are excluded from permit requirements.
11. Surface water withdrawals for all other purposes not otherwise excluded by subdivisions 4 through 10 of this subsection that total less than:
 - a. 10,000 gallons per day from nontidal waters.
 - b. Two million gallons per day from tidal waters.

B. DEQ may require any owner or operator of a surface water withdrawal system excluded from permit requirements by subdivisions A 3 through A 11 of this section to cease withdrawals and file an application and receive a permit prior to resuming any withdrawal when the board's assessment indicates that a withdrawal, whether individually or in combination with other existing or proposed projects:

1. Causes or contributes to, or may reasonably be expected to cause or contribute to, a significant impairment of the state waters or fish and wildlife resources;
2. Adversely impacts other existing beneficial uses; or
3. Will cause or contribute to a violation of water quality standards.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 1.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-320. Preapplication procedures for new or expanded surface water withdrawals.

A. Preapplication review panel. At the request of a potential applicant for a surface water withdrawal proposing to the Department of Environmental Quality to withdraw 90 million gallons a month or greater, a preapplication review panel shall be convened prior to submission of a VWP application. The preapplication review panel shall assist potential applicants that are proposing surface water withdrawals with the early identification of issues related to the protection of beneficial instream and offstream uses of state waters and the identification of the affected stream reach. DEQ shall notify the Virginia Marine Resources Commission, the Virginia Institute of Marine Science, the Virginia Department of Game and Inland Fisheries, the Virginia Department of Conservation and Recreation, the Virginia Department of Health, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, and other appropriate local, state, and federal agencies of the preapplication review panel request. These agencies shall participate to the extent practicable in the preapplication review panel by providing information and guidance on the potential natural resource impacts

and regulatory implications of the options being considered by the applicant and shall provide comments within 60 days of the initial meeting of the preapplication panel.

B. Preapplication public notice. For new or expanded surface water withdrawals requiring an individual VWP permit and proposing to withdraw 90 million gallons a month or greater, a potential applicant shall provide information on the project, shall provide an opportunity for public comment on the proposed project, and shall assist in identifying public concerns or issues prior to filing a VWP individual permit application.

1. Except as provided in this subsection, the potential applicant shall provide for publication of notice once a week for two consecutive weeks in a newspaper of general circulation serving the locality where the surface water withdrawal is proposed to be located.

2. If requested by any person, the potential applicant shall hold at least one public information meeting. Notice of any public information meeting held pursuant to this subsection shall be provided at least 14 days prior to the public information meeting date and shall be published in the same manner as required in subdivision 1 of this subsection. A potential applicant shall submit the notice to DEQ for posting on the DEQ website. At a minimum, any notice required by this subsection shall include:

- a. A statement of the potential applicant's intent to apply for a VWP permit for a surface water withdrawal;
- b. The proposed location of the surface water withdrawal;
- c. Information on how the public may request a public information meeting or, in the alternative, the date, time, and location of the public information meeting;
- d. The name, address, and telephone number of the potential applicant, or an authorized representative who can answer questions or receive comments on the proposed surface water withdrawal; and
- e. A statement of how oral or written public comments will be used.

3. In accordance with the provisions of 9VAC25-780-50 C 11 and 9VAC25-780-150, a potential applicant shall not be required to publish public notice or provide an opportunity for a public information meeting if a public meeting has been held within two years prior to the submittal of an application for a VWP permit on a local or regional water supply plan, which includes the proposed project.

4. The potential applicant shall maintain a list of persons making comment and their addresses and shall make a good faith effort to notify commenters at the address provided by the commenter when the public notice for the draft VWP individual permit is available.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007; amended, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-330. Coordinated review with the Virginia Marine Resources Commission on applications for surface water withdrawals.

A. The Department of Environmental Quality shall coordinate the review of an application for surface water withdrawals that also requires a Virginia Marine Resources Commission (VMRC) permit under Chapter 12 (§ 28.2-1200 et seq.) of Title 28.2 of the Code of Virginia with the VMRC in accordance with § 62.1-44.15:5.01 of the Code of Virginia.

B. The initial application for surface water withdrawals that requires both an individual Virginia Water Protection Permit and a VMRC permit shall be advertised concurrently by DEQ and VMRC. When appropriate, such advertisement may be in the form of a joint public notice of the application, prepared by VMRC with the assistance of DEQ, published once in a newspaper of general circulation in the area affected by the proposed activity in accordance with VMRC regulations and policy. Such advertising shall be paid for by the applicant.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 3.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-340. Application requirements for surface water withdrawals.

A. Persons proposing to initiate a new or expanded surface water withdrawal not excluded from requirements of this chapter by 9VAC25-210-310, proposing to reapply for a current

permitted withdrawal, or a Federal Energy Regulatory Commission (FERC) license or relicense associated with a surface water withdrawal, shall apply for a VWP permit.

B. In addition to informational requirements of 9VAC25-210-80 B and if applicable, 9VAC25-210-80 C, applications for surface water withdrawals or a FERC license or relicense associated with a surface water withdrawal shall include:

1. As part of identifying the project purpose, a narrative describing the water supply issues that form the basis of the proposed project purpose.
2. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows, if available;
3. The average daily withdrawal; the maximum daily, monthly, annual, and instantaneous withdrawals; and information on the variability of the demand by season. If the project has multiple intake structures, provide for each individual intake structure and the cumulative volumes for the entire surface water withdrawal system.
4. The monthly consumptive use volume in million gallons and the average daily return flow in million gallons per day of the proposed project and the location of the return flow, including the latitude and longitude and the drainage area in square miles at the discharge point.
5. Information on flow dependent beneficial uses along the affected stream reach. For projects that propose a transfer of water resources from a major river basin to another major river basin, this analysis should include both the source and receiving basins.
 - a. Evaluation of the flow dependent instream and offstream beneficial uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural, electric power generation, and commercial and industrial uses.
 - b. The aquatic life, including species and habitat requirements.
 - c. How the proposed withdrawal will alter flows.
6. Information on the proposed use of and need for the surface water and information on how demand for surface water was determined (e.g., per capita use, population growth rates, new uses, changes to service areas, and if applicable, acreage irrigated and evapotranspiration effects). If during the water supply planning process, the need for the

withdrawal was established, the applicant may submit the planning process information, provided that the submittal addresses all requirements of 9VAC25-210-360. The board shall deem such a submittal as meeting the requirements of this subsection. For surface water withdrawals for public water supply, see also 9VAC25-780-100 and 9VAC25-780-130.

7. Information describing the intake structure, to include intake screen mesh size and intake velocity.

8. For withdrawals proposed from an impoundment, the following:

a. Description of the flow or release control structures, including the minimum rate of flow, in cubic feet per second, size and capacity of the structure, and the mechanism to control the release.

b. Surface area in acres, maximum depth in feet, normal pool elevation, total storage capacity, and unusable storage volume in acre-feet.

c. The stage-storage relationship. For example, the volume of water in the impoundment at varying stages of water depth.

9. Whether the proposed surface water withdrawal is addressed in the water supply plan that covers the area in which the withdrawal is proposed to be located. If the proposed withdrawal is included, provide a discussion as to how the proposed withdrawal is addressed in the water supply plan, specifically in terms of projected demand, analysis of alternatives, and water conservation measures. If all or a portion of the withdrawn water will be transferred to an area not covered by the plan, the discussion shall also include the water supply plan for the area of the receiving watershed.

10. An alternatives analysis for the proposed surface water withdrawal, including at a minimum, the criteria in 9VAC25-210-360.

11. For new or expanded surface water withdrawals proposing to withdraw 90 million gallons a month or greater, a summary of the steps taken to seek public input as required by 9VAC25-210-320 and an identification of the issues raised during the course of the public information meeting process.

12. For new or expanded surface water withdrawals that involve a transfer of water between major river basins that may impact a river basin in another state, a plan describing procedures to notify potentially affected persons, both in and outside of Virginia, of the proposed project.

13. For surface water withdrawals, other than for public water supply, information to demonstrate that alternate sources of water supply are available to support the operation of the facility during times of reduced instream flow.

C. Applications for an Emergency Virginia Water Protection Permit.

1. Applications for an Emergency Virginia Water Protection Permit to address a public water supply emergency shall include the information noted in subdivisions 1 a through 1 o of this subsection. The JPA may be used for emergency application purposes, provided that all of the information in subdivisions 1 a through 1 o of this subsection is included:

- a. The applicant's legal name, mailing address, telephone number, and if applicable, fax number and electronic mail address;
- b. If different from applicant, name, mailing address, telephone number, and if applicable, fax number and electronic mail address of property owner;
- c. If applicable, authorized agent's name, mailing address, telephone number, and if applicable, fax number and electronic mail address;
- d. Name of water body or water bodies, or receiving waters, as applicable;
- e. Name of the city or county where the project occurs;
- f. Signed and dated signature page (electronic submittals containing the original signature page, such as that contained in a scanned document file are acceptable);
- g. Permit application fee in accordance with 9VAC25-20;
- h. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows , if available;
- i. Information on the aquatic life along the affected stream reach, including species and habitat requirements;
- j. Recent and current water use including monthly water use in the previous calendar year and weekly water use in the previous six months prior to the application. The application shall identify the sources of such water and also identify any water purchased from other water suppliers;
- k. A description of the severity of the public water supply emergency, including (i) for reservoirs, an estimate of days of remaining supply at current rates of use and replenishment; (ii) for wells, current production; and (iii) for intakes, current streamflow;

- l. A description of mandatory water conservation measures taken or imposed by the applicant and the dates when the measures were implemented; for the purposes of obtaining an Emergency Virginia Water Protection Permit, mandatory water conservation measures shall include, but not be limited to, the prohibition of lawn and landscape watering, vehicle washing, watering of recreation fields, refilling of swimming pools, and washing of paved surfaces;
 - m. An estimate of water savings realized by implementing mandatory water conservation measures;
 - n. Documentation that the applicant has exhausted all management actions that would minimize the threat to public welfare, safety, and health and will avoid the need to obtain an emergency permit, and that are consistent with existing permit limitations; and
 - o. Any other information that demonstrates that the condition is a substantial threat to public health or safety.
2. Within 14 days after the issuance of an Emergency Virginia Water Protection Permit, the permit holder shall apply for a VWP permit under the other provisions of this chapter.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-350. Duty to reapply for a permit for a continuation of a surface water withdrawal.

A. Any permittee with an effective permit for a surface water withdrawal shall submit a new permit application at least 270 days before the expiration date of an effective permit, unless permission for a later date has been granted by the board. The Department of Environmental Quality may administratively continue an expiring permit in accordance with 9VAC25-210-65.

B. The applicant shall provide all information described in 9VAC25-210-340 and applicable portions of 9VAC25-210-80 for any reapplication. The information may be provided by referencing information previously submitted to the department that remains accurate and

relevant to the permit application. The board may waive any requirement of 9VAC25-210-340 and the applicable portions of 9VAC25-210-80 B, if it has access to substantially identical information.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-360. Evaluation of project alternatives for surface water withdrawals.

The applicant shall demonstrate to the satisfaction of the board that the project meets an established need for water to meet the project purpose. In establishing need, the applicant shall provide the following information:

1. Existing supply sources, yields, and demands, including:
 - a. Peak day and average daily withdrawal;
 - b. The public water supply safe yield and lowest daily flow of record;
 - c. Types of water uses; and
 - d. Existing water conservation measures and drought response plan, including what conditions trigger their implementation.
2. Projected demands over a minimum 30-year planning period, including the following:
 - a. Projected demand contained in the local or regional water supply plan developed in accordance with 9VAC25-780 or for the project service area, if such area is smaller than the planning area; if applicable or
 - b. Statistical population (growth) trends; if applicable, projected demands by use type; projected demand without water conservation measures; and projected demands with long-term water conservation measures.
3. Any alternatives analysis conducted specifically for withdrawals for public water supply shall include:
 - a. The range of alternatives to be analyzed by the applicant as follows:
 - (1) All applicable alternatives contained in the local or regional water supply plan developed in accordance with 9VAC25-780;

- (2) Alternatives that are practicable or feasible from both a technical and economic standpoint that had not been identified in the local or regional water supply plan developed in accordance with 9VAC25-780;
 - (3) Alternatives that are available to the applicant but not necessarily under the current jurisdiction of the applicant; and
 - (4) Water conservation measures that could be considered as a means to reduce demand for each alternative considered by the applicant.
- b. The applicant shall provide a narrative description that outlines the opportunities and status of regionalization efforts undertaken by the applicant.
- c. The criteria used to evaluate each alternative for the purpose of establishing the least environmentally damaging practicable alternative, which includes but is not limited to:
- (1) Demonstration that the proposed alternative meets the project purpose and project demonstrated need as documented pursuant to this section;
 - (2) Availability of the alternative to the applicant;
 - (3) Evaluation of interconnectivity of water supply systems, both existing and proposed;
 - (4) Evaluation of the cost of the alternative on an equivalent basis;
 - (5) Evaluation of alternative public water supply safe yields;
 - (6) Presence and potential impact of alternative on state and federally listed threatened and endangered species;
 - (7) Presence and potential impact of alternative on wetlands and streams (based on maps and aerial photos for all alternatives, field delineation required for preferred alternative);
 - (8) Evaluation of effects on instream flow; and
 - (9) Water quality considerations, including:
 - (a) Land use within a watershed where the type of land use may impact the water quality of the source;
 - (b) The presence of impaired streams and the type of impairment;
 - (c) The location of point source discharges; and

(d) Potential threats to water quality other than those listed in this subdivision 3 c (9).

4. Any alternatives analysis conducted for surface water withdrawals other than for public water supply shall include the following items of subdivision 3 of this section: subdivisions 3 a (3), 3 a (4), and 3 c. The analysis shall also include applicable items of subdivisions 3 a (1), 3 a (2), and 3 b.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001; amended, Virginia Register Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-370. VWP permit conditions applicable to surface water withdrawal permits.

A. In addition to the conditions established in 9VAC25-210-90 and 9VAC25-210-100, each VWP permit shall include conditions meeting the requirements established in this section, where applicable.

B. Instream flow conditions. Subject to the provisions of Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 of the Code of Virginia, and subject to the authority of the State Corporation Commission over hydroelectric facilities contained in Chapter 7 (§ 62.1-80 et seq.) of Title 62.1 of the Code of Virginia, instream flow conditions may include, but are not limited to, conditions that limit the volume and rate at which surface water may be withdrawn at certain times, the public water supply safe yield, and conditions that require water conservation and reductions in water use.

1. In the development of conditions that limit the volume and rate at which surface water may be withdrawn, consideration shall be given to the seasonal needs of water users and the seasonal availability of surface water flow.

2. Consideration shall also be given to the affected stream reach and the amount of water that is put to a consumptive use in the process.

3. In the development of instream flow conditions for new withdrawals, the board shall take into consideration the combined effect on the hydrologic regime of the surface water within an affected stream reach due to consumptive water uses associated with:

a. All existing permitted withdrawals;

- b. The total amount of withdrawals excluded from VWP permit requirements; and
- c. Any other existing lawful withdrawals.

4. VWP permits for surface water withdrawals, other than for public water supply, shall identify how alternate sources of water supply will be made available to support the operation of the permitted facility during times when surface water withdrawals will be curtailed due to instream flow requirements or shall provide for modification of the operation of the facility to ensure compliance with permit conditions. Such modifications may include, but are not limited to, termination or reduction of activities at the facility that are dependent on the permitted withdrawal, increase capacity to capture and store higher flows, or implementation of other potential management options.

C. VWP permits issued for surface water withdrawals from the Potomac River between the Shenandoah River confluence and Little Falls shall contain a condition that requires the permittee to reduce withdrawals when the restriction or emergency stage is declared in the Washington Metropolitan Area under the provisions of the Potomac River Low Flow Allocation Agreement or when the operating rules outlined by the Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers, an attachment to the Water Supply Coordination Agreement, are in effect. The department, after consultation with the Section for Cooperative Water Supply Operations on the Potomac (CO-OP), shall direct the permittee as to when, by what quantity, and for what duration withdrawals shall be reduced.

D. The board may issue permits for new or expanded surface water withdrawals that are not excluded from the requirements of this chapter by 9VAC25-210-310 based on the following criteria:

1. The amount of the surface water withdrawal is limited to the amount of water that can be put to beneficial use.
2. Based on the size and location of the surface water withdrawal, the withdrawal is not likely to have a detrimental impact on existing instream or offstream uses.
3. Based on an assessment by the board, this withdrawal, whether individually or in combination with other existing or proposed projects, does not cause or contribute to, or may not reasonably be expected to cause or contribute to:
 - a. A significant impairment of the state waters or fish and wildlife resources;
 - b. Adverse impacts on other existing beneficial uses; or
 - c. A violation of water quality standards.

4. In cases where the board's assessment indicates that criteria contained in subdivisions 2 and 3 of this subsection are not met, the board may issue a permit with special conditions necessary to assure these criteria are met.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 2.4, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Errata, 17:3 VA.R. 433 October 23, 2000; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-380. Modifications to surface water withdrawal permits.

A. In addition to the requirements of 9VAC25-210-180 B, VWP permits for surface water withdrawals may be modified when any of the following developments occur:

1. When the board determines that minimum instream flow levels resulting directly from the permittee's withdrawal of surface water are detrimental to the instream beneficial use, existing at the time of permit issuance, and the withdrawal of surface water should be subject to further net limitations or when an area is declared a surface water management area pursuant to §§ 62.1-242 through 62.1-253 of the Code of Virginia, during the term of the VWP permit.
2. Significant changes to the location of the surface water withdrawal system are proposed such that the Department of Environmental Quality determines a new review is warranted due to the potential effect of the surface water withdrawal to existing beneficial uses of the new location.
3. Changes to the permitted project or the surface water withdrawal, including increasing the storage capacity for the surface water withdrawal, that propose an increase in the maximum permitted withdrawal volumes or rate of withdrawal or that cause more than a minimal change to the instream flow requirements with potential to result in a detrimental effect to existing beneficial uses.
4. A revision to the purpose of the surface water withdrawal that proposes to include a new use or uses that were not identified in the permit application or a modification of the existing authorized use or uses such that the use description in the permit application

and permit is no longer applicable. Examples of uses include, but are not limited to agricultural irrigation, golf course irrigation, public water supply, manufacturing, and electricity generation.

B. Minor modifications may be made in the VWP permit for surface water withdrawals without following the public involvement requirements of 9VAC 25-210-140, 9VAC 25-210-160, or 9VAC 25-210-170. Any request for a minor modification shall be in writing and shall contain the facts or reasons supporting the request. The board may request additional information as necessary to review a request for a minor modification. Minor modifications may only occur in accordance with 9VAC25-210-180 E and the following items specific to surface water withdrawals:

1. Minor changes to the location of the surface water withdrawal system, as determined by DEQ, and thus not warranting a new review of the effect of the surface water withdrawal to existing beneficial uses.
2. Allow for temporary changes to instream flow requirements or operational permit requirements to address situations such as surface water withdrawal system improvements, environmental studies, or as otherwise determined appropriate by DEQ.
3. Changes to the permitted project, including increasing the storage capacity for the surface water withdrawal, that do not cause more than a minimal change to the instream flow requirements and do not have the potential to result in a detrimental effect to existing beneficial uses.
4. Changes to the monitoring methods or locations of monitoring sites for instream flow requirements or surface water withdrawal requirements.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 4.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-390. Variance from surface water withdrawal permit conditions.

A. For public water supplies. The board may grant a temporary variance to any condition of a VWP permit for a surface water withdrawal for a public water supply to address a public water

supply emergency during a drought. A permittee requesting such variance must provide all information required in the application for an Emergency Virginia Water Protection Permit identified in 9VAC25-210-340 C.

B. For all other water supplies. The board may grant a temporary variance to any condition of a VWP permit for a surface water withdrawal during a drought. A permittee requesting such variance must affirmatively demonstrate:

1. Public health and safety interests are served by the issuance of such variance; and
2. All management actions consistent with existing permits have been exhausted.

C. As a condition of any variance granted, the permittee shall:

1. Modify operations or facilities to comply with existing VWP permit conditions as soon as practicable; or
2. Provide new information to the board that alternate permit conditions are appropriate and either apply for a new VWP permit or a modification to its existing VWP permit. The board shall review any such application consistent with other sections of this chapter.

D. In addition, the board may require the permittee to take any other appropriate action to minimize adverse impacts to other beneficial uses.

E. Any variances issued by the board shall be of the shortest duration necessary for the permittee to gain compliance with existing permit conditions, apply for a new VWP permit, or request modification of existing permit conditions.

F. Public notice of any variance issued by the board shall be given as required for draft permits in 9VAC25-210-140 A, B, and C. Such notice shall be given concurrently with the issuance of any variance and the board may modify such variances based on public comment. Publication costs of all public notices shall be the responsibility of the permittee.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007; amended, Virginia Register Volume 32, Issue 21, eff. August 2, 2016.

Part VI
Enforcement

9VAC25-210-500. Enforcement.

The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and § 10.1-1186 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 5.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 32, Issue 21, eff. August 2, 2016.

Part VII
Miscellaneous

9VAC25-210-600. Delegation of authority.

The director, or a designee acting for him, may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 6.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 32, Issue 21, eff. August 2, 2016.

9VAC25-210-610. Transition.

A. All applications received on or after August 2, 2016, will be processed in accordance with these new procedures.

B. VWP individual permits issued prior to August 2, 2016, will remain in full force and effect until such permits expire, are revoked, or are terminated and during any period of administrative continuance in accordance with 9VAC25-210-65.

C. Section 401 Water Quality Certificates issued prior to December 31, 1989, have the same effect as a VWP permit. Water Quality Certificates issued after this date will remain in effect until reissued as Virginia Water Protection Permits.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Historical Notes

Derived from VR680-15-02 § 6.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 32, Issue 21, eff. August 2, 2016.

FORMS (9VAC25-210)

Department of Environmental Quality Water Division Permit Application Fee Form (rev. 10/2014)

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (rev. 3/2014)

Virginia Department of Transportation, Inter-Agency Coordination Meeting Joint Permit Application (eff. 6/2008)

Tidewater Joint Permit Application for Projects Involving Tidal Waters, Tidal Wetlands and/or Dunes and Beaches in Virginia (rev. 3/2014)

Monthly Reporting of Impacts Less than or Equal to One-Tenth Acre Statewide (eff. 8/2007)

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-210)

Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. II, et al., United States Fish and Wildlife Service, December 1979, Reprinted 1992

Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region (Version 2.0), April 2012

Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), November 2010

Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report

Forestry Best Management Practices for Water Quality in Virginia Technical Guide, Fourth Edition, 2002, Department of Forestry

Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230

Potomac River Low Flow Allocation Agreement, January 11, 1978, § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986

Virginia Agricultural Best Management Practices (BMP) Manual, Revised June 2000, Department of Conservation and Recreation

Virginia Drought Assessment and Response Plan, March 28, 2003, Drought Response Technical Advisory Committee

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation

Virginia Stormwater Management Handbook, First Edition, 1999, Volume I, Chapter 3, Department of Conservation and Recreation

Water Supply Coordination Agreement, July 22, 1982, an attachment to the Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers